IN THE

Supreme Court of the United States

October Term, 1955

No. 444

BINGLER VACATION TOURS, INC.,
Appellant

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees,

And

ASBURY PARK-NEW YORK TRANSIT CORP., QUAKER CITY BUS COMPANY, HUDSON TRANSIT LINES, INC. AND NATIONAL BUS TRAFFIC ASSOCIATION, INC.,
Intervenor-Appellees

On Appeal from the United States District Court for the District of New Jersey

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MOTION TO AFFIRM

Intervenor-appellees move, pursuant to Rule 16, Par. 1(c) of the Revised Rules of the Supreme Court of the United States, that the judgment of the court below be affirmed, on the ground that it is manifest that

the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

NATURE OF THE CAUSE

This is a direct appeal from a judgment, entered June 9, 1955 and reported at 132 F. Supp. 793, of a three judge District Court for the District of New Jersey, convened pursuant to 28 U.S.C. 2284 and 2325, dismissing appellant's complaint, which sought to set aside an order of the Interstate Commerce Commission. The latter order, reported at 62 M.C.C. 731, ordered appellant to cease and desist from operations of the character found unlawful in the Commission's report.

INTERVENOR-APPELLEES

Intervenor-Appellees Asbury Park-New York Transit Corp. and Quaker City Bus Company filed the original complaints to the Interstate Commerce Commission from which the cease-and-desist order emanated. They participated as complainants in all proceedings before the Interstate Commerce Commission and as intervenor-defendants before the court below. The operations which appellant was ordered to cease, were in direct competition with the certificated regular-route operations of those intervenor-appellees.

Intervenor-Appellees Hudson Transit Lines, Inc. and National Bus Traffic Association, Inc. participated in all proceedings before the Interstate Commerce Commission as intervenors, and in proceedings before the court below as intervenor-defendants.

THE CASE BELOW

Appellant's certificate authorizes the transportation of passengers over irregular routes in special opera-

tions, "restricted to traffic originating at the points indicated in round trip sightseeing or pleasure tours", from New York City and three New Jersey counties through fifteen Eastern states.

Appellant's operations which were found to be unlawful by both the Commission and the Court below, consisted of daily, scheduled, expeditious, nonstop, operations over direct routes (a) between the fixed termini of New York City and Asbury Park, New Jersey during the summer season, (b) between the fixed termini of New York City and Monmouth Park race track, near Asbury Park, during the periods when racing meets were there in session and (c) between the fixed termini of New York City and Garden State race track during the periods when racing meets were there in session. Appellant's buses departed from New York City at a fixed hour in the morning and from the other terminus at a fixed hour in the evening, in each case virtually simultaneously with identical schedules of intervenor-appellees over essentially the same route. During the periods in question, these were virtually the only individual-ticket operations conducted by appellant, despite its authority to conduct individual-ticket operations through a 15-state territory.

The details of the operations, as found by the Commission and the Court below, are summarized in Finding of Fact No. 5 of the Court below. The Commission also found, and appellant does not deny, that the operations in issue were ordinary, bare, expeditious transportation between fixed termini, identical in every essential with the certificated regular route operations of intervenor-appellees which they duplicated. (See Finding of Fact No. 6 of the Court below.)

Appellant's certificate was issued by the Commission pursuant to the exception to the proviso of Section 207(a) of the Motor Carrier Act (49 U.S.C. 307(a)) which reads:

> "*Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

The issue before the Commission was whether that certificate, restricted by its terms to radial irregular-route sightseeing or pleasure tours through the 15-state territory, authorizes operations of the character described above.

The Commission interpreted appellant's certificate as not including authority to conduct ordinary, bare, expeditious transportation between fixed termini, for the reason that a contrary interpretation would:

(a) Contravene the "uniformly defined and commonly understood meaning of the term 'tour' " (62 M.C.C. 745),

(b) Render futile the prohibitory proviso of Section 207(a), quoted above,

(c) Violate the purport of the limitations in the certificate (62 M.C.C. 746), and

(d) Destroy certificated regular-route service, contrary to the public interest and the National Transportation Policy (62 M.C.C. 746).

The Court below, in dismissing the action to set aside the Commission's decision, affirmed those findings.

QUESTIONS RAISED BY THE APPEAL

The only questions raised by appellant's Statement As To Jurisdiction are:

1. Whether the Commission's report and order are rendered invalid as a matter of law by the fact that the Commission distinguishes cases involving applications for *regular-route* and *fixed-termini* certificates on the ground that no operational analogy necessarily follows between such a certificate and the *irregular-route territorial* certificate here in issue (62 M.C.C. 745).

2. Whether the cease-and-desist order is invalid for vagueness and indefiniteness in prohibiting operations "of the character found in said report on oral argument to be beyond the scope of the authority heretofore granted to it".

ARGUMENT

1. Appellant contended before the Commission that certain decisions granting regular-route and fixed-termini tour certificates required a determination that the operations described above were within the scope of appellant's certificate. The Commission overruled that contention, observing that the instant case involved only the interpretation of a *radial, territorial, irregular route tour certificate* as applied to specific facts, which, in turn, were found to compel the conclusion that the operations complained of were nothing more than bare expeditious round-trip passenger transportation between the specified points, that a certificate between fixed termini contemplates concentration on operations between those two points (as distinguished from operations through a *territory*), and that "no operational analogy necessarily follows" between the authority granted in a *territorial* type of certificate

and those permissible under a *regular-route* or *fixed termini* certificate. (62 M.C.C. 745, 746).

Appellant now construes those observations as (a) drawing an invalid distinction, (b) erroneously applying different legal standards, and (c) holding that the operations found to be outside its certificate would be lawful under a fixed-termini tour certificate (Statement As To Jurisdiction pp. 7-19).

Appellant's construction raises a fictitious issue which is without substance or materiality in the determination of this cause. In the first place, the only certificate before the Commission in this proceeding, and the only certificate interpreted by it, is the territorial type of certificate held by appellant. The Commission's determination of the limitations upon the type of *certificate here in issue,* as applied to the *operations here in issue,* stands upon its own feet. It was not necessary to that determination that the Commission interpret any other type of certificate, or consider operations factually different from those in issue. Any interpretation of fixed-termini certificates in this proceeding would have been mere *obiter dictum,* and would not have affected appellant nor have been binding upon any carrier.

Second, appellant's contention, that no valid distinction exists between the pattern of operation permissible under regular-route and fixed-termini tour certificates and the pattern permissible under irregular-route territorial tour certificates, is contrary to the long-settled law, as pronounced by this Court.

United States v. *Maher,* 307 U.S. 148, 155

The very case relied upon by appellant,

United States v. *Carolina Freight Carriers Corporation,* 315 U.S. 475, 486

recognizes the statutory differences in the "pattern of the operation" between territorial and fixed-termini certificates.

See also, *Falwell* v. *United States,* 69 F. Supp. 71, 77, affirmed 330 U.S. 809;

Brady Transfer & Storage Co. v. *United States,* 80 F. Supp. 110, affirmed 335 U.S. 875;

Crescent Express Lines v. *United States,* 320 U.S. 401

Third, the Commission did *not* hold that operations identical with those complained of could be conducted lawfully under fixed-termini tour certificates. It clearly avoided any such determination on the ground that "no operational analogy necessarily follows" between regular-route or fixed termini certificates and the irregular-route territorial certificate here in issue (62 M.C.C. 745).

It is true that the Commission observed that the fixed-termini tour cases contemplated that such carriers operate between the termini granted, but it did not thereby imply that those carriers were authorized to conduct any operations other than *bona fide* tours between those termini, or that the operations *here involved* constituted *bona fide* tours. On the contrary, as indicated by the Commission (62 M.C.C. 745), the operations here found unlawful are clearly not within "the uniformly defined and commonly understood meaning of the term 'tour' ", which the report discusses at 62 M.C.C. 743. Although a valid distinction exists between the two types of tour certificates, that fact is immaterial to the present case. Appellant's

operations would not be lawful or permissible even under a fixed-termini tour certificate.

Cf. *Harold L. Lesh, Common Carrier Application,* I.C.C. Docket No. MC-97122 (Sub No. 2) Decided June 30, 1955.

Since the question raised by appellant is unsubstantial, the issue is merely whether the Commission properly interpreted its own certificate. The opinion of the Court below and its Findings of Fact and Conclusions of Law demonstrate that no substantial question exists in this respect. It is fundamental that the interpretation of its own certificate is peculiarly within the province of the Commission.

> *Adirondack Transit Lines* v. *United States,* 59 F. Supp. 503, aff'd. 324 U.S. 824;
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> *Malone Freight Lines* v. *United States,* 107 F. Supp. 946, aff'd. 344 U.S. 925

The basis of that interpretation is clearly correct. As found by the Commission and the Court below, Section 207(a) expressly forbids the granting of irregular-route passenger carrier certificates, except for special or charter operations. If an irregular-route, special-operation tour certificate, such as that here in issue, should be interpreted as authorizing ordinary, scheduled, bare expeditious transportation between points—i.e. the precise type of operation contemplated by *regular route* certificates,—that prohibition would become futile. Moreover, as further found by the Commission and the Court [Finding of Fact No. 6(c)], if carriers with such broad irregular-route territorial authority can concentrate at will upon the basic traffic of the regular route carriers in ordinary, day-to-day,

bare, expeditious transportation, in the manner indulged in by appellant, the destruction of dependable regular-route service is inevitable, thereby defeating the public interest, the purpose of the Act, and the National Transportation Policy. An interpretation having the foregoing effects cannot be a correct interpretation.

It is implicit in the prohibitory proviso of Section 207(a) that the pattern of service authorized in any passenger certificate over irregular-routes be specified in such a way as to preclude the chaotic and destructive effect which must follow from the provision of ordinary regular-route service thereunder. That purpose represents the statutory standard, which the Commission found to have been uniformly applied in numerous cases (62 M.C.C. 744).

That purpose can be accomplished in many ways, even in limitations upon the size or type of equipment to be used.

> *Crescent Express Lines, Inc.* v. *United States,* 320 U.S. 401

In appellant's certificate, the Commission used the restrictive words "round-trip sightseeing or pleasure tours" as the differentiating specification to meet the standard of preventing the holder from using the certificate as if it were a regular-route, fixed-termini certificate. That is the standard required by the statute and the National Transportation Policy to be applied to appellant's irregular-route territorial certificate. It was the standard applied by the Commission below. The interpretation advocated by appellant would require the abandonment of that standard, and is, therefore, invalid.

Thus, the record facts are uncontradicted, there is abundant evidence to support the findings, and the rational basis for the decision reached is clearly set forth. The law requires no more.

Mississippi Valley Barge Line Company v. *United States,* 292 U.S. 282.

The Court below properly found in its Findings of Fact and Conclusions of Law that not only was there a rational basis for the ultimate finding, but that to have found, as appellant desired, would have contravened Sections 206, 207(a) and 208(a) of the Act, and would in effect have been destructive of the Congressional intent which sought to preclude the very type of chaotic destructive competition created by appellant through misuse of its restricted certificate. To find as appellants desired would have been to ignore the restrictive language in the certificate, which specified the type of service permitted. Thus, neither the Commission nor the Court violated any rights of appellant warranted by its definitely restricted certificate allowing only round trip, sightseeing and pleasure tours.

2. The only other question raised by appellant (Statement As To Jurisdiction, Pages 19-25) is that the Commission's cease-and-desist order is invalid for vagueness or indefiniteness because it ordered appellant to abstain from the performance of any transportation of the character found to be beyond the scope of its authority under its certificate. It is claimed that appellant has no way of determining what it may or may not do in the way of transportation under its certificate because of "the inability or unwillingness of the Commission to delineate the elements which do not constitute a tour." It is claimed that appellant is

thereby placed under peril of the heavy penalties provided by Section 222 of the Interstate Commerce Act (49 U.S.C. 322).

Appellant's contention clearly raises no substantial question. The Commission told appellant that it may not lawfully use a territorial, round-trip, sightseeing-or-pleasure-tour certificate as a claimed basis for operations that are in effect regular-route, expeditious point-to-point service. As the court below properly found in its Conclusion of Law No. 6,

> "the Commission has gone to considerable length in advising Bingler of the factors relevant to a determination of its rights under its certificate. It has done so both in terms of the criteria of ordinary regular-route service, which Bingler must avoid, and in terms of the service which Bingler is authorized to carry on."

In the first place, appellant has neither more nor less authority than it had prior to the Commission's Order, for the Commission merely interpreted the meaning of its certificate. It has been put on additional notice that the certificate does not authorize it to engage in ordinary, bare, expeditious transportation between fixed termini, and has been given the benefit of dictionary definitions, case analyses, and explicit enunciation of the governing criteria to assist it in avoiding violations of that certificate. Appellant has been placed in a *better* position to confine itself to lawful operations than it was prior to the Commission's Order.

Secondly, the penal provisions of 49 U.S.C. 322 apply equally to violations of "any term or condition of any certificate" as to violations of a Commission Order. Since the Commission has confined its order to the law-

ful limits, as determined by it, of appellant's certificate itself, any act constituting a violation of the order likewise would be a violation of its certificate, and therefore would be already subject to those penal provisions. Appellant's peril has not been increased by the order. On the contrary, its peril has been *decreased* by the Commission's clear enunciation of the criteria upon which the determination of its lawful scope of operations depends.

Appellant's claim that the failure of the Commission to indulge in speculation with respect to imaginary factual situations not of record, so as to list the factual details of every conceivable operation permissible under the type of authority held by appellant, as well as those prohibited by such authority, is without substance. In the first place, such specification would stultify regulation in this field, and would be analogous to an attempt by the Supreme Court to announce, in a case involving a single set of facts, every conceivable factual transaction which might come within the meaning of "interstate commerce." The varieties of factual interplay of the determinative criteria are infinite. Appellant itself would be among the first to attack any attempt to lay down a precise list of those situations as a definition of the limits of its authority.

The cases cited by appellant (Statement as to Jurisdiction Pages 22-25) which deal with the necessity for the basic findings and a complete statement of the grounds of the Commission's determination are not in point. The detailed factual findings, the subordinate findings and conclusions, and the ultimate findings, as well as the rational basis and legal theory upon which the Commission proceeded are clearly set forth. The criteria which it applied in its expert discretion in determining that appellant's certificate does not embrace

ordinary bare, expeditious, transportation between fixed termini, are likewise fully disclosed.

In short, appellant's contention on this question is identical with the contention so fully demolished by the Court in *Brady Transfer & Storage Co.* v. *United States,* 80 F. Supp. 110, 118, affirmed 335 U.S. 875, and other cases cited in the opinion below (132 F. Supp. 798) and needs no further argument before this Court.

CONCLUSION

For the foregoing reasons, the questions upon which the decision of the present appeal depends are so unsubstantial as not to need further argument. The effect upon appellant of being forced to forego any further unlawfully-obtained revenues, and the speculative effect of the interpretation upon others (who were never sufficiently interested to intervene either before the Commission or in the court below), cited by appellant in its Statement As To Jurisdiction, Page 26, do not add any substantiality to the questions upon which this cause depends.

Accordingly, intervenor-appellees respectfully move that the judgment of the District Court be affirmed.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have this day made service of the foregoing Motion to Affirm upon the parties of record shown below, in compliance with Paragraphs 1 and 2 of Rule 33 of the Revised Rules of the Supreme Court of the United States, by depositing same in an United States Post Office or mail box, with First Class Postage Prepaid, to the Post Office addresses shown below.

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Dated at Washington, D. C. this ~~First~~ Second Day of November, 1955.

JACK R. TURNEY, JR.